

Governor's Review
South Dakota Division of Insurance
Procedures and Practices for Investigating Complaints against Insurance Companies

Issued by:
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Governor's Report on Division of Insurance

Overview

In May 2013, the Division of Insurance (DOI) came under scrutiny for its procedures involving the investigation and resolution of long term care insurance consumer complaints. DOI was not able to publicly respond to the concerns expressed because South Dakota law prohibits the disclosure of ongoing examinations and investigations.

DOI became a division of the Department of Labor and Regulation (DLR) on April 15, 2011 with Governor Daugaard's Executive Reorganization Order 2011-1. In response to recent scrutiny of DOI's procedures for assisting consumers, Governor Daugaard asked DLR Secretary Pamela Roberts to complete a report on DOI's practices to be made public within 30 days of June 5, 2013. The Governor's charge to Secretary Roberts was to review DOI's procedures and practices for investigating complaints against licensed South Dakota insurance companies.

The Secretary's review of DOI covered four main categories. The first was the history of long term care insurance products and the regulatory efforts of DOI. The second focus of the Secretary was to review the current DOI consumer complaint process. The next phase analyzed the investigation process of DOI; in particular the process of examinations, investigations and disciplinary procedures. The final category reviewed privacy and transparency statutes as applied to insurance investigations and examinations.

The Secretary's review focused on DOI activity from January 1, 2006, to the present. Recommendations were developed around three specific areas:

- ❖ Statutory authority
- ❖ Internal policies and procedures
- ❖ Privacy requirements and transparency

1. History of Long Term Care Insurance Products and Regulatory Efforts

South Dakota has a long history of protecting consumers of long term care insurance. In the late 1980s, limited skilled nursing home insurance policies evolved to more comprehensive long term care insurance policies to provide coverage for all levels of nursing home care as well as optionally offering coverage for home health care, assisted living care and other ancillary benefits. Further, the industry began to change the triggering of long term care benefits to the new standard of "inability to perform activities of daily living" which the Health Insurance Portability and Accountability Act (HIPAA) codified in 1996 for tax qualified plans and which became the dominant type of long term care product offered.

South Dakota's first significant involvement with long term care insurance regulation occurred in 1989 when the National Association of Insurance Commissioners (NAIC) model was enacted. The model set forth consumer protections for long term care insurance such as limiting preexisting condition exclusions and requiring policies be guaranteed renewable. The South Dakota Division of Insurance (DOI) followed up with more comprehensive rules in 1990 addressing some of the more abusive industry practices which were occurring at the time. One such rule was the medical necessity rule, which was a South Dakota specific rule requiring the medical necessity trigger of benefits be met if a physician certified that long term care was medically necessary. This was in reaction to the frequency of claim denials by insurers despite the attending physician attesting to the need for the long term care.

The following examples, as well as those contained throughout the remainder of the report, are taken from actual DOI case files.

Example 1

Consumer Y's family member contacted DOI regarding claim denials on a long-term care policy. Company X was denying claims based on Consumer Y not meeting the chronically ill definition of said policy. Consumer Y's family appealed unsuccessfully with Company X six different times before contacting DOI. DOI then contacted Company X through the consumer complaint process. The review found benefits were due Consumer Y. Claims in the amount of \$43,800 were readjudicated. DOI's review also found deficiencies in Consumer Y's policy language which prompted a change in the companies claim procedures.

Example 2

A caregiver contacted DOI with concerns over Consumer Y's long-term care benefits not being paid appropriately. DOI contacted Company X through the consumer complaint process. DOI found that policy language was not clear on the benefit owed to the consumer, resulting in the claim being re-adjudicated and processed in the amount of \$24,950. Company X also agreed to correct misleading policy information as a result of the review.

Example 3

Consumer Y's daughter-in-law contacted DOI on behalf of Consumer Y regarding a dispute over an assisted living claim denial. Company X denied the claim based on Consumer Y not meeting the activities of daily living definition. DOI contacted Company X through the consumer complaint process. In addition, Consumer Y filed an external review through an Independent Review Organization (IRO) to review the benefit trigger determination under South Dakota Regulations. The IRO upheld Company X's denial. DOI was unable to secure benefits for the insured as the company denied the claim appropriately in accordance with the terms and conditions of the policy and South Dakota laws and regulations.

Although concerns were expressed by industry over the need for additional consumer protection rules, DOI adopted marketing standards, required assisted living to be covered, and set standards for home health care in 1995 and 1996. In 2002, to address a persistent problem of agents constantly replacing policies for unsuspecting seniors (rigorous enforcement of then existing laws against agents proved to be an insufficient deterrent), a prohibition on first year commissions for replacement policies was adopted despite strong industry objections. Also in 2002 the NAIC rate stabilization requirements were put into effect to encourage adequate initial pricing of products to lessen the need for future premium increases.

Example 4

DOI received a complaint from the daughter of Consumer Y stating Company X was not paying long term care benefits. Company X's denial of benefits was based on Consumer Y residing in an assisted living facility, which Company X claimed was not covered by the policy. The investigation found the policy violated [ARSD 20:06:21:51](#), which states, "an insurer offering long term care coverage to any person in this state must include benefits for assisted living centers." ARSD 20:06:21:51 has an effective date of October 20, 1996. Company X issued the policy on November 16, 1996, 17 days after ARSD 20:06:21:51 went into effect. As a result of the investigation, Company X paid Consumer Y the long term care benefits due. Additionally, Company X agreed to pay benefits for assisted living facilities for other active policy holders with no additional premiums charged. DOI entered into a Consent Order requiring Company X to pay a monetary penalty of \$5,000 for multiple violations of ARSD 20:06:21:51.

In 2007, South Dakota became one of the first states to take advantage of the new federal law allowing states to adopt a long term care partnership program. In conjunction with the partnership rules, DOI also adopted a clean claim requirement requiring prompt payment of long term care claims, external review which enabled claimants to have an appeal to outside independent experts to determine whether the benefit triggers have been reached, and suitability requirements.

Other attempts to strengthen South Dakota laws regarding unfair claims denials included numerous legislative attempts to adopt a version of the NAIC unfair claims practices models. In 1994, 1997, 2006, 2007, and 2008 attempts to pass DOI sponsored unfair claims legislation failed, primarily due to staunch industry opposition.

The Division of Insurance played an active role nationally in the development of long term care standards at NAIC dating back to the inception of the first NAIC long term care model. Since that time, South Dakota has remained an active participant on NAIC long term care committees.

In part due to less than expected lapsation by insureds, the NAIC rate stabilization measures were not as effective as envisioned. The current NAIC Senior Issues Task Force committee is working on revisions to rate stabilization to put stronger standards in place to not only affect future sales but to require substantive steps on existing policies with the intended effect of limiting future long term care insurance premium increases. DOI is a member of the NAIC Senior Issues Task Force.

2. Consumer Complaint Process

Over the past several years, the DOI consumer complaint process has also evolved. For many years, DOI has had four consumer complaint analysts responsible for fielding phone calls and working consumer complaints from start to finish. Historically these four positions reported to one common person. From 2006 through 2009 the four complaint analysts reported to the Chief Legal Counsel for the Department of Revenue and Regulation. In 2010, they were reassigned to report to a new Assistant Director position in DOI.

In 2011, DOI was reorganized into functional units similar to the organizational structure of other states' Division of Insurance offices. An Assistant Director of Life and Health and an Assistant Director of Property Casualty were established. The four complaint analysts have always been specialized in two areas; two analysts handle Life and Health complaints, and two analysts work on Property and Casualty complaints. With the reorganization, the analysts were assigned to their respective Assistant Directors who have product expertise. Insurance is a vast subject matter and by aligning product types by lines, a better flow and sharing of information resulted. Reorganizing DOI resulted in more efficient review and management of complaint files and resolution of complaints in a more specialized manner.

In response to the Patient Protection and Affordable Care Act (PPACA) requirements, a senior health care analyst was recently added to the office of the Assistant Director of Life and Health. The senior analyst is responsible for compiling and assessing data relative to health complaints, including long term care insurance complaints, evaluating research and best practices relating to consumer outreach, and implementing findings as appropriate. This position also provides technical expertise to staff and performs audits of analyst complaint files.

Other changes in the consumer complaint process have been implemented since 2006. In 2007 the Division of Insurance switched from an antiquated database to a web based data management system. This has allowed for increased efficiencies in tracking and analyzing data. In early 2008, the Division implemented an online complaint form to make the process easier for consumers.

In 2010, new procedures were implemented and complaint staff now meet with their respective Assistant Director on a bi-monthly basis where open complaint files are discussed at length. This ensures no file is closed which has not been reviewed by management; this was not the case prior to 2010. This arrangement also allows staff and management to identify any patterns in practice of companies or producers. Those identified as having consistent issues are taken to the entire management team to discuss and develop a strategy on how to move forward.

Additional procedural measures were also augmented to include internal reports which allow management staff to analyze company or agent specific patterns as to numbers of complaints, types of complaints, types of policies and other data reports. The Division also receives information from the NAIC and other state regulators on potential issues that may be occurring with companies on a nationwide basis. This information can either be investigated directly by DOI or jointly through a multistate effort to examine or settle issues with the company.

The data management system implemented in 2007 allows DOI to run monthly reports to track complaint status. This data is then compiled into an excel spreadsheet and sent to complaint analysts and management staff for review. Complaint numbers fluctuate from year to year due to external factors (i.e. natural disasters like hail, tornados, floods, etc.). DOI envisions a potential increase in complaints in 2013 and throughout 2014 due to the Patient Protection and Affordable Care Act.

In 2011, DOI fielded over 3,850 phone calls and recorded over \$1.9 million dollars in recoveries for consumers. In 2012 the recovery for consumers was over \$1.4 million with approximately 3,400 phone calls fielded.

The Division sends Consumer Satisfaction Surveys to 33% of all complaints closed in the previous month. All surveys are reviewed and entered into a data management system. Unfavorable complaints are given to the Assistant Director for review of the corresponding file and potential follow up. In 2011, 82% of the individuals who responded to the survey indicated they would contact the office again. This number increased in 2012 to 88%.

3. Investigation and Examination Process

If DOI believes a violation of South Dakota law or regulations occurred, an investigation is opened. This process involves higher level cases that are handled primarily by two compliance agents and may also involve licensing staff. These compliance agents investigate the facts of each case and obtain appropriate documentation for review and action. The agents work with their supervisors, the management team and legal team to review each case. Compliance agents meet with their supervisor weekly to discuss cases and a monthly meeting is held with compliance agents and the DOI management team to discuss files.

Cases may start from a finding in a consumer complaint; however they are more likely to start outside of that process from a variety of sources including: required filings, self-reporting, company investigations, other-state action, litigation, etc. These files are typically focused on the investigation of insurance producers (agents), insurers (companies) and other entities (Third Party Administrators, Discount Medical Plan Organizations; Pharmacy Benefit Managers, etc.). Investigation files include the analysis of both licensed and unlicensed entities if they are operating in South Dakota.

From January 1, 2006 through June 5, 2013 the Division has completed and closed 6,775 investigation files. A break down of closed files by year follows:

Year	2006	2007	2008	2009	2010	2011	2012	2013
Count	695	929	906	794	968	919	1155	409

Once an investigation file is opened, the nature of the complaint and the suspected violations greatly impact the course of the investigation. For example, if a compliance agent believes an insurance agent failed to update their address within 30 days as required by statute, the compliance agent would send a letter to the insurance agent asking for an explanation of his/her actions. However, if the compliance agent believes an insurance agent is misappropriating consumer funds, the investigation is escalated for immediate action.

Example 5

Consumer Y filed a complaint regarding a Medicare Supplement plan sold to a South Dakota senior. As a result of the complaint, Company X refunded Consumer Y's premium and application fee of \$270.32. The matter was then referred to investigations for further review. The investigation found Agent Z had misrepresented the Medicare Supplement plan type sold to the consumer. Additionally, Agent Z submitted the application and drafted premiums from Consumer Y's bank account without obtaining authorization from Consumer Y. The investigation resulted in Agent Z's South Dakota insurance producer's license being revoked via a Consent Order.

Example 6

Consumer Y claimed he was misquoted on his premium for a universal life policy. Company X, indicated they had provided information to Agent Z that resulted in the

misquoted premium. Company X reimbursed Consumer Y \$1,769.00 to rectify the misquote of the premium.

Consumer Y also indicated Agent Z had said the policy had a guaranteed death benefit when in fact the policy did not. Agent Z denied he ever said this. In order to remedy Consumer Y's concerns, Company X extended the death benefit guarantee to age 105. DOI was unable to take legal action against Agent Z in this case as there was insufficient evidence to prove he had misled the consumer.

While many investigation files are focused on a single instance or violation, some contain the violation of multiple statutes and regulations and affect multiple consumers. Given the broader scope of these investigations, they require more detailed analysis than the typical correspondence found in a routine file. Examples include: desk audits, agency examinations, examination of a specific practice, financial examinations, market conduct examinations and multi-state market conduct examinations. Each of these heightened levels of review require the reconstruction of insurance claims files. These files by their very nature are extremely document intensive.

Market conduct examinations are the most intensive and comprehensive form of review. A market conduct examination requires a very specific skill set and many years of insurance experience. Due to the skill set required, and the level of compensation tied to that skill set, DOI contracts with INS Regulatory Insurance Services, Inc. (INS) to provide market conduct examinations. INS is a well respected national firm which was awarded this State contract through competitive bid in 2009. DOI also contracts with outside financial examiners and a variety of actuaries.

The costs of company examinations are initially the responsibility of the company being examined. This would include all examination costs such as paying for the examiners, travel, experts, and any other associated examination expense. Upon completion of an examination, the examined company has the right to request reimbursement from the examination fund. The fund is administered by DOI and funded by assessments on all licensed insurance companies.

Market conduct examinations are complex and require more time to resolve than general consumer complaints or investigations. DOI employs a market conduct coordinator to gather and disseminate exam information between the division and the companies. This process generally involves significant correspondence back and forth for review, follow-up, and analysis of the information depending upon the type of company and the findings or criticisms. Various stages of the exam require that review and approval be completed by multiple staff members beyond the coordinator's level of expertise. Meetings to review this information are held as needed and involve the management team and applicable staff. The advantage of completing a market conduct examination, as opposed to a less lengthy process, is the market conduct process can and does uncover otherwise undiscoverable objectionable company policies.

Currently DOI has six market conduct examinations which have been open for an average of 434.3 days. The chart below compares the NAIC's nationwide examination data to the Division's examination data:

NAIC Exam Data:	SD Exam Data:
Closed Exams: 524.1 days average	Closed Exams: 504.5 days average
Open Exams: 484.8 days average	Open Exams: 434.3 days average
Open and Closed: 513.6 days average	Open and Closed: 450.5 days average

South Dakota completes market conduct examinations faster than the national average in every category.

Below is a listing of the number of South Dakota market conduct examination and Multi-State Market Conduct examinations that South Dakota has participated in since 2006. It also includes the number of South Dakota examinations closed and the number of Multi-State examination settlements and any corresponding monetary penalties.

Year	SD Exams Opened	SD Exams Closed	SD Exams Settlement Amount	Multi-State Settlements	Multi-State Settlement Payments to South Dakota
2006	0			1	\$144,663.39
2007	1			1	\$6,250.70
2008	1	1	\$15,000.00	2	\$56,616.00
2009	2	1	\$81,844.18	1	1 Revocation
2010	4			3	\$6,333.00
2011	1	2	\$116,000.00	0	
2012	3 ¹	2	\$2,500.00	6	\$809,515.81
2013	0			3	\$128,641.10

South Dakota Exam Settlements:	\$215,344.18
Multi-State Settlement Payments to South Dakota:	\$1,152,020.00
Total Exam Settlement Amount:	\$1,367,364.18

In addition to the aforementioned procedures, DOI also reviews insurance companies through a "Level One" analysis. DOI's market conduct coordinator has access to a national database which uses a wide variety of metrics to rate insurance companies who have an increased likelihood of violations. Since 2008, DOI has completed 81 Level One reviews, including an analysis of all of the companies which became subject to a market conduct examination in South Dakota. Additionally, DOI has access to the 1,345 Level One reviews compiled annually by all the other states. DOI uses this important tool to determine which companies need to be examined.

¹ There were three large groups selected for examinations. Each group had multiple exam Orders issued for subsidiary companies, 5 companies in one Group, 8 in another, and 4 in a third Group.

DOI also participates in insurance regulation at the national level. Staff attend all meetings of the NAIC's Market Actions Work Group (MAWG) and participate in all MAWG calls to stay on top of national trends and discover issues other state regulators are having with insurance companies, insurance agents or other insurance related entities.

Finally, the DOI reviews all class-action law suit filings pertaining to the insurance industry. These filings are reviewed by a compliance agent and DOI legal staff. Appropriate follow-up action is taken as warranted.

Once DOI determines statutory violations have occurred, a decision is made regarding which disciplinary options should be applied. For minor offenses, DOI can issue a warning letter. A warning letter is sent when the offense is a technical violation but does not warrant an additional penalty. A common example would be an insurance agent forgetting to update his or her address with DOI within 30 days. After the warning letter, DOI's regulatory authority is significantly less flexible.²

If DOI takes disciplinary action against a licensee, the only options are to suspend, revoke or refuse to renew a license for an insurance agent, business entity or insurance company unless the licensee being disciplined agrees to a monetary penalty. SDCL 58-4-28.1 states:

In any case in which the director has the power to deny an application, revoke, refuse to renew, or suspend the license of any insurance producer, solicitor, or administrator or the certificate of authority of any insurance company or health maintenance organization, the director may permit an applicant or licensee to elect in writing to pay a specified money penalty within a specified time in lieu of a license suspension or other permitted action.

The money penalty may not exceed five thousand dollars for an insurance producer or twenty-five thousand dollars for an insurer, administrator, or health maintenance organization for each offense.

Since DOI cannot directly impose a monetary penalty, a negotiated consent order settlement is pursued in almost every file where the licensee responds to DOI.

If a licensee will not agree to a monetary penalty, DOI is left with no choice but to suspend or revoke the license of the offending party. While this may seem like an appropriate resolution, it can be equally problematic. Once DOI has revoked a license, they no longer have leverage over a licensee to ensure future compliance with South Dakota law and regulations. Consumers are then left with insurance contracts that are still in force with an insurance company DOI no longer has authority to regulate. For

² Also see Section One concerning past Division attempts to pass unfair claims legislation.

this reason DOI typically negotiates a consent order settlement with an offending licensee which provides remedies for consumers and policy holders, a monetary penalty for violations and future compliance with statutes and regulations.

To help remediate their lack of disciplinary options, DOI proposed Senate Bill 62³ which passed the 2012 legislature. Effective July 1, 2013, whenever an insurance company's certificate of authority is revoked, DOI can require the insurance company move South Dakota policies to a different insurance company licensed to do business in South Dakota. SB 62 is a new tool which will provide better protection for consumers and will increase DOI's ability to secure the best possible resolution for consumers.

Discipline resulting from a market conduct examination presents another set of challenges related to the market conduct examination report. SDCL 58-3-12 requires that upon the completion of an examination, the examiner in charge files an examination report under oath which DOI transmits to the company. Once the company receives the report, the company has 30 days to respond. Once the company has responded, the Director has 30 days to accept, reject or modify the report or to call for an investigatory hearing to gather more documentation.

In most instances companies are as concerned about the language in the report as they are about any remedial action they are ordered to take or any monetary penalty they may have to pay. It is very difficult to have a voluminous examination report reviewed by the insurance company and their lawyers and negotiate within 30 days all of the language, penalties and remedial action that must be completed. Therefore, the timeframes found in SDCL 58-3-12 become problematic when combined with the volume of information and the complexity of the issues contained in an exam report and the need to negotiate a resolution. If DOI and the company cannot reach an agreement, litigation will result.

To avoid these timing issues, DOI normally shares a draft copy of the examination report with the company prior to official service. Once the insurance company has a draft copy of the examination report, the insurance company and DOI begin negotiating all aspects of the market conduct examination. When DOI and the insurance company have resolved as many of the issues as possible, the Division formally serves a copy of the examination report on the insurance company and triggers the timeframes in SDCL 58-3-12.

DOI can not disclose a market conduct examination in process pursuant to SDCL 1-27-29. The market conduct examination draft report outlines the existing violations of statutes, regulations, and additional findings. During the review of the draft market conduct examination report, DOI and the insurance company become aware of violations of statutes and regulations. In many instances, DOI directs the insurance company to take corrective or remedial action upon finding the violation. However, any

³ <http://legis.state.sd.us/sessions/2013/Bill.aspx?Bill=62>.

corrective action taken by an insurance company either during the course of an examination or during the negotiation of a settlement is not disclosed until the examination process is completed. As a result, DOI immediately protects consumers by having insurance companies readjudicate consumer claims and implement new policies while DOI and the insurance company negotiate other elements of the examination report or other elements of a consent order. This is good for consumers because it enables corrective action and the resolution of the problems at the beginning rather than the end of the examination process when the information becomes public.

Example 7

During a market conduct examination of Company X, a number of issues related to the proper adjudication of claims were discovered. These issues included benefit qualifiers that were more restrictive than allowed by statute and claims being withdrawn prior to adjudication. Once these issues were identified, Company X took remedial actions prior to the completion of the market conduct examination. Company X's internal policies and procedures were updated to ensure compliance with South Dakota law, and the company's employees were trained on the changes. Most importantly, Company X went back and investigated all claim denials and withdrawn claims in South Dakota. This resulted in benefit payments to South Dakota policy holders months prior to the completion of the market conduct examination.

Example 8

During a market conduct examination of Company X, a number of Medicare supplement noncompliant marketing procedures were identified, and Company X was informed. As a result of discussions with DOI, a number of changes were immediately put into effect prior to the completion of the market conduct examination. New procedures included steps to ensure consumers were provided proper disclosures, sales made to seniors were utilizing suitable marketing standards, consumers were provided up-to-date forms, and duplicate coverage was not sold. Once the market conduct examination was complete, a settlement was entered into which included a monetary penalty paid by Company X in the amount of \$81,844.18.

As noted above, any public resolution, other than the suspension or revocation of a license, requires a signed consent order agreement. A consent order includes DOI's allegations against the licensee, jurisdiction over the matter, and the terms and conditions that the licensee agrees too. All consent orders that DOI enters into are public documents and every consent order entered into since July 1, 2012, is available on DOI's website. Those prior to July 1, 2012, are available upon request.

4. Transparency & Confidentiality of Investigations and Examination

When DOI analyzes a consumer complaint or investigation file, or examines a licensee, specific statutes govern their ability to disclose information. SDCL 1-27-29 states:

No state agency may disclose that it is conducting a financial investigation, examination, or audit of a private entity while the financial investigation, examination, or audit is ongoing, except as provided by SDCL 1-27-31.

DOI cannot disclose it is conducting an examination of a private entity and it cannot disclose the details of that examination.

The Legislature has also exempted investigations undertaken by state agencies and any materials which are otherwise confidential by statute from South Dakota's public records law.⁴ DOI does not release examination or investigation reports pursuant to public records requests.

Specific parts of examinations and investigations are also confidential, including documents, memoranda, and other internal correspondence.⁵ Private banking and other information is confidential, including medical information.⁶ In many cases, the Health Insurance Portability and Accountability Act ("HIPAA"),⁷ and its implementing regulations,⁸ apply and create confidentiality for certain medical records.⁹

Any materials generated by DOI to determine whether regulatory action was necessary and any materials relating to the deliberative process concerning decisions arising from the Director's official duties are confidential.¹⁰

Once an examination has been completed, any materials relating to the above remain confidential. Further, SDCL 58-4-44 provides that:

...the director may withhold from public inspection any examination or investigation report for so long as the director deems such withholding to be necessary for the protection of the person examined or investigated against unwarranted injury or to be in the public interest...

Because the confidentiality standard outlined above burden complainants who could not receive information regarding their own complaints, DOI proposed legislation, which passed in the 2012 legislature, allowing the disclosure of "the status, existence, or

⁴ SDCL § 1-27-1.5(5) and (20).

⁵ SDCL §§ 1-27-1.5(12), 1-27-1.7, and 58-4-45.

⁶ SDCL §§ 1-27-1.5(2), (7), (10), and (16), and 58-4-45.

⁷ 42 U.S.C. Sections 1320d – 1320d-8 (2003).

⁸ 45 C.F.R. Parts 160 and 164.

⁹ The Division is considered a health oversight agency under HIPAA. As such the Division is not directly subject to HIPAA privacy requirements. By being a health oversight agency, covered entities and others can share protected health information with the Division without authorization. However, sharing otherwise protected health information with others in a manner that is non-HIPAA compliant could subject the Division to HIPAA compliance issues and cause the flow of information to the Division to be interrupted by concerned covered entities. In addition, the Division is subject to SDCL § 58-4-45.

¹⁰ SDCL § 1-27-1.7 and 1-27-1.9.

outcome of any ongoing or completed investigation or report to the director pertaining to the specific investigation or examination.” SDCL 58-4-49.

At the conclusion of an examination or investigation, DOI may take administrative actions. These actions are reported to the National Association of Insurance Commissioners and are publically available records.

Confidentiality of documents and the ability to subpoena records are related issues. In the instance of a subpoena, only privileged documents may be withheld.¹¹ Therefore, DOI must comply with lawfully issued subpoenas by providing information, including confidential examination and investigation materials, unless a privilege applies to a particular document.¹² DOI’s compliance with subpoenas relating to confidential examination and investigation materials has been upheld in federal court.¹³ DOI can no longer maintain confidentiality if the party receiving confidential information pursuant to a subpoena releases the information that DOI cannot otherwise disclose.

Finally, SDCL 58-4-44 provides:

Any investigation not completed within twenty-four months shall be presented to the secretary of labor and regulation. If, after sixty days, the secretary has not completed the investigation, the secretary shall forward the matter to the attorney general who shall review the file and make recommendations to the secretary for the purpose of ensuring final action is taken concerning the investigation.

This procedural provision was established in 2006 to ensure that long-standing investigations are completed in a timely manner. The legislature recognized the examination process takes longer than other investigations and they specifically excluded the market conduct examination process from the 24 month timeframe

¹¹ SDCL § 15-6-26(b)(1).

¹² Attorney work product or communications are examples.

¹³ See United States District of South Dakota, Southern Division, CIV. 12-4051-KES, document 128, filed 03/11/13.

Findings, Required Actions, and DOI Responses

The following findings are the result of the Secretary's review of DOI's procedures and practices for investigating consumer complaints. The corrective action statements provide the Secretary's directives to DOI to implement change. The response statements detail DOI's plans for addressing the findings and implementing the directives.

Finding 1:

Justified long term care complaint files were closed erroneously prior to 2010.

DOI Response:

In 2010, DOI established procedures to require approval of a supervisor before any consumer complaint is closed and implemented bi-monthly supervisory meetings with complaint analysts to ensure that complaints are being properly handled. The manager of the complaint process from 2006 to 2010 no longer works for DOI.

Finding 2:

DOI did not inform the DLR Secretary of ongoing market conduct examinations.

Required Action:

DOI should inform DLR Secretary of the status of ongoing market conduct examinations on a monthly basis.

DOI Response:

Beginning immediately, DOI will report on the status of any market conduct examination or any major investigation in their monthly report.

Finding 3:

DOI lacks sufficient enforcement authority to adequately address insurance market abuses.

Required Action:

DOI should seek legislative enactment of a version of NAIC unfair claims practices model. DOI should also seek legislation which would give the state authority to independently fine insurers/agents without consent of the licensee and independently order restitution to insureds/claimants who are treated unfairly.

DOI Response:

DOI agrees with the identified areas for improvement in enforcement authority. When a company is found to be in violation of the law, current statutes do not allow for the DOI to either directly order the policyholders be made whole or to directly fine insurance companies. DOI has unsuccessfully brought forth unfair claims legislation in recent years, but will try again. DOI will draft legislation by September 30, 2013, to be considered for introduction during the 2014 legislative session.

Finding 4:

Once the company has been served with the market conduct examination, the statutory timelines do not allow enough time for negotiation.

Required Action:

DOI should seek legislation allowing an informal settlement process to take place following the serving of the report.

DOI Response:

DOI agrees resolving market conduct examinations through an informal settlement process is the most efficient method of resolution. This informal process is not currently outlined in statute.

DOI will draft legislation due by September 30, 2013, to be considered for introduction during the 2014 legislative session.

Finding 5:

Market conduct examinations take many months to compile and resolve.

Required Action:

DOI needs to expedite resolution of any market conduct examination by establishing timelines for completion of each component of the process. DOI should hold monthly management and market conduct staff meetings dedicated solely to monitor progress of market conduct examinations involving insurance companies as the licensee.

DOI Response:

Beginning immediately, DOI will assign the market conduct coordinator to run the market conduct examination from beginning to end and meet monthly with the management team and applicable staff regarding timeframes for completion. Timelines for completion of each component of any scheduled market conduct examination will be provided to the Secretary within 90 days.

Finding 6:

The public is inadequately informed on the findings and recommendations on completed market conduct examinations.

Required Action:

DOI should post all completed market conduct examination reports on its website. DOI should issue a press release at the conclusion of any major investigation or examination.

DOI Response:

DOI will post market conduct examinations on its website for all future market conduct examination reports within 30 business days of completion. DOI will issue press releases within 5 business days of the conclusion of any major investigation or examination.

Finding 7:

The statutory confidentiality of market conduct examinations does not allow DOI to inform consumers about an ongoing market conduct examination or any remedial action or readjudication of claims that occur during the course of a market conduct examination until the examination and any settlement are completely resolved.

Required Action:

DOI should draft appropriate legislation for the 2014 Session, which will allow consumers to be informed about ongoing market conduct examinations, and remedial action or readjudication of claims that occur during the course of a market conduct examination.

DOI Response:

DOI agrees that it would be beneficial for consumers to be informed about ongoing market conduct examinations, and remedial action or readjudication of claims that occur during the course of a market conduction examination at the time that those actions occur.

DOI will draft legislation by September 30, 2013, to be considered for introduction during the 2014 legislative session.